M. RATNAVALE v. THE GOVERNMENT OF THE FEDERATION OF MALAYA

[O.C.J. (Hepworth J.) October 27, 1963]

[Penang — Civil Suit No. 119 of 1961]

Administrative Law—Delegation of Powers Ordinance, 1952, s.2—Delegation of powers to Establishment Officer—Requirement of notification in the Gazette—Whether imperative or merely directory.*

Constitutional Law—Federation of Malaya Constitution, 1957, Articles 132, 135, 139, 144 & 162—Public Services Commission—Power of appointment and power to dismiss.

Pensions Ordinance, 1951 s.10(f)—Compulsory retirement of Government servant—Notice of retirement given by Establishment Officer—Delegation of powers—Absence of notification in the Gazette—Whether retirement lawful.

Interpretation of Statutes—Delegation of Powers Ordinance, 1952—Requirement of notification in the Gazette—Whether imperative or merely directory.

The plaintiff, a government servant, held the post of Assistant Controller of Foreign Exchange which appointment had been made by the Public Services Commission. On July 16, 1960 the Principal Establishment Officer informed the plaintiff by letter that as a result of the abolition of his post, it had been decided to retire him in accordance with section 10(f) of the Pensions Ordinance. The Principal Establishment Officer claimed to have acted under powers purported to have been delegated to him by the High Commissioner although the delegation had not been published by notification in the *Gazette* as required by section 2 of the Delegation of Powers Ordinance, 1952.

Held: the requirement in section 2 of the Delegation of Powers Ordinance that power is to be delegated by notification published in the *Gazette* is of an imperative nature. The notification is the operative act of delegation, and the act of delegation is only complete when the instrument of delegation is contained in a notification published in the *Gazette*. In this case as no notification was made in the *Gazette* the dismissal was void and of no effect.

CIVIL SUIT.

Jag-Jit Singh (*V. K. Palasuntharam* with him) for the plaintiff.

Wan Suleiman bin Pawan Teh (Senior Federal Counsel) for the defendant.

Eusoffe Abdoolcader held a watching brief for Bank Negara Malaysia.

Cur. Adv. Vult.

Hepworth J.: The plaintiff's claim in this case is for:—

(1) A declaration that his purported retirement from the post of Assistant Controller of Foreign Exchange was void, inoperative and of no effect and that he still holds the said post.

(2) An order that the defendant do pay to the plaintiff all arrears of pay, allowances, and other emoluments due and owing to him as Assistant Controller of Foreign Exchange from the date of the said purported retirement.

(3) In the alternative, damages for wrongful dismissal of the plaintiff on or about the 16th July, 1960, or alternatively for breach of the contract of service between the plaintiff and the defendant.

(4) A declaration that the post of Assistant Controller of Foreign Exchange was never abolished.

The plaintiff pleads that by letter dated the 30th December, 1957, the Public Services Commission offered to the plaintiff appointment to the post of Assistant Controller of Foreign Exchange, Penang, with effect from the 1st January, 1958, and the plaintiff accepted the said offer of appointment and assumed his duties on the 1st January, 1958. By letter dated the 16th October, 1959, the said Public Services Commission confirmed the said appointment with effect from the 22nd June, 1959.

The plaintiff pleads that on or about the 16th July, 1960, the defendant required the plaintiff to retire from the public service purporting to act in accordance with the Pensions Ordinance, 1951, section 10(f), by reason of the purported abolition of the plaintiff's office.

The plaintiff pleads that the said purported retirement was a dismissal within the meaning of section 29 of the Interpretation and General Clauses Ordinance, 1948, as set out in the Eleventh Schedule to the Constitution of the Federation of Malaya (hereinafter referred to as the Constitution) and within the meaning of Articles 135 and 144 of the Constitution. The plaintiff contends that by virtue of the Constitution the power to terminate the said appointment of the plaintiff was at all material times vested in the Public Services Commission and that in the circumstances the purported retirement of the plaintiff was void, inoperative and of no effect.

The plaintiff also avers in the alternative that the action referred to amounted to a wrongful dismissal of the plaintiff by the defendant and the plaintiff is thereby entitled to damages.

The defendant admits that the plaintiff was appointed by the Public Services Commission but contends that in a letter dated the 16th July, 1960, the defendant required the plaintiff to retire from the public service, that this action was in accordance with the provisons of section 10(f) of the Pensions Ordinance, 1951, in consequence of the abolition of the office which had been held by the plaintiff, and that the said office was in fact abolished. The defendant denies that the retirement of the plaintiff was an act of premature termination of service as alleged, and denies that the retirement of the plaintiff was a dismissal within the meaning of the Interpretation and General Clauses Ordinance, 1948, as set out in the Eleventh Schedule to the Constitution or within the meaning of

* See now s.3 Delegation of Powers Ordinance, 1956.

Articles 135 and 144 of the Constitution.

The defendant pleads that the retirement of the plaintiff was under section 10(f) of the Pensions Ordinance, 1951, was valid and lawful, was made in a proper manner by the proper authority and there had been no contravention of Article 135 of the Constitution, section 10 of the Pensions Ordinance, 1951, or natural justice.

Shortly the facts were as follows. The plaintiff joined the Government Service in 1940 in the Foreign Exchange Department. His service over the ensuing years was satisfactory and by letter dated the 30th December, 1957, he was offered the post of Assistant Controller of Foreign Exchange by the Public Services Commission which offer he accepted. By letter dated the 16th October, 1959, the Public Services Commission conveyed their approval for him to be confirmed in his appointment. This appointment was on the permanent establishment but was not pensionable.

In 1960 it was decided by the Government that the Bank Negara was to take over the functions of the Foreign Exchange Control Department. The Bank Negara is a statutory corporation under the provisions of the Central Bank of Malaya Ordinance, 1958. At a meeting on the 30th May, 1960, at which, amongst others, representatives of the Principal Establishment Officer, the Bank Negara and the Controller of Foreign Exchange were present, it was agreed that the members of the permanent staff of the Foreign Exchange Control Department, including the plaintiff, should be seconded to the Bank Negara on their existing terms of service for an initial period of 12 months. This agreement was referred to in a letter from the Secretary to the Treasury to the Principal Establishment Officer dated the 27th June, 1960, a copy of which was sent by the Assistant Controller of Foreign Exchange, Kuala Lumpur, to the plaintiff on the 28th June, 1960.

By letter dated the 16th July, 1960, addressed to the plaintiff and forwarded to the plaintiff by the Secretary to the Treasury in a letter of the same date, the Principal Establishment Officer informed the plaintiff that it had been decided that in consequence of the re-organisation of the Department of Foreign Exchange Control his post would be abolished with effect from the 1st August, 1960, and that it had been decided to retire him on the abolition of his post in accordance with section 10(f) of the Pensions Ordinance, 1951. The plaintiff wrote on the 12th August, 1960, to the Permanent Secretary, Prime Minister's Department, through the President of the Senior Government Officers' Association asking for the decision to be reconsidered setting out in detail his reasons. No acknowledgment of this letter was ever received. Finally after representations has been made by his solicitor to the Attorney-General a reply was received by the plaintiff from the Permanent Secretary, Prime Minister's Department, dated the 12th July, 1961, stating that he could find no ground on which he would be justified in varying the decision to retire the plaintiff on abolition of office. The plaintiff then commenced these proceedings.

Briefly the plaintiff's arguments are as follows:—

(1) (a) The plaintiff is a member of the general public service of the Federation under paragraph (c) of clause (1) of Article 132 of the Constitution.

(b) The Public Services Commission's jurisdiction extends to the appointment of all persons who are members of the services mentioned in, *inter alia*, paragraph (c) of clause (1) of Article 132 of the Constitution by virtue of clause (1) of Article 139.

(c) Section 29 of the Interpretation and General Clauses Ordinance, 1948, applies to the interpretation of the Constitution by virtue of clause (1) of Article 160 and provides that power to appoint includes power to dismiss.

(d) The plaintiff says that the person with power to dismiss him is therefore the Public Services Commission and not the Principal Establishment Officer.

(e) By virtue of the provisions of clause (6) of Article 162 the provisions of section 10 of the Pensions Ordinance, 1951, should be applied as if the authority under that section were the Public Services Commission.

(2) The Principal Establishment Officer was not authorised in law to make the purported retirement.

(3) The purported dismissal was effected by an authority subordinate to that which at the time of the dismissal had power to appoint a member of that service of equal rank contrary to clause (1) of Article 135 of the Constitution.

(4) The purported dismissal was effected without the plaintiff being given a reasonable opportunity of being heard contrary to Clause (2) of Article 135 of the Constitution.

It is conceded on the part of the defendant that if the action taken under section 10(f) of the Pensions Ordinance, 1951, amounted to a dismissal the provisions of clause (2) of Article 135 apply and he should have, but has not, been given a reasonable opportunity of being heard. It is however the contention of the defendant that the action taken under section 10(f) of the Pensions Ordinance, 1951, does not amount to a dismissal.

The provisions of section 10(f) of the Pensions Ordinance, 1951, as amended by the Pensions (Amendment) Ordinance, 1955, read as follows:—

"10. It shall be lawful for the High Commissioner in the case of a Federal officer or in the case of a Settlement officer and for the Ruler of the State in the case of a State officer, subject, as regards any officer appointed

under instructions received from or through the Secretary of State, to the approval of the Secretary of State, to require any officer to retire from the public service in the Federation —

. . . . . .

(f) on the abolition of his office; or

. . . . . "

It is not necessary, however, for me to go into any of these questions, other than (2) above, because of the following facts which only came to light when the defendant had opened his defence. During the course of the evidence of the first defence witness the learned Senior Federal Counsel for the defence wished to put in a document which he indicated was a document by which his powers under section 10(f) of the Pensions Ordinance, 1951, had been delegated by the High Commissioner to the Principal Establishment Officer. This was objected to by the plaintiff on three grounds. The first was that this document had not been disclosed in the defendant's affidavit of documents. The second was that this delegation was a question of fact which must be pleaded if a party wanted to rely on it and the defendant had not pleaded it. And the third was that the delegation should have been made in accordance with the provisions of section 2 of the Delegation of Powers Ordinance, 1952, which required the delegation to be published as a notification in the *Gazette* and no such notification had been published.

As regards the second ground I think that the defendant's pleadings were adequate in that he had pleaded in paragraph 12 of the defence that the retirement was made in a proper manner by the proper authority.

The third ground however was a very different matter. It was admitted by the defendant that at no time had any delegation of the powers under section 10(f) of the Pensions Ordinance, 1951, been published in the *Gazette*. The defendant submitted that the provisions of the Delegation of Powers Ordinance, 1952, (which was in force when the delegation which was not gazetted had been made) were not imperative but only directory in character and he quoted a considerable number of authorities in support of this contention, most of which appear in the footnotes to pages 94 and 95 of "*Judicial Review of Administrative Action*" by Dr. S. A. de Smith. He said that the act of gazetting was not part and parcel of the act of delegation. The act of delegation was complete as soon as the then High Commissioner had signed the document of delegation and that the documentary evidence of this delegation was admissible under the provisions of section 91 of the Evidence Ordinance.

In the alternative it was argued that the Principal Establishment Officer was only acting as a clerk or amanuensis of the appropriate authority (who, by virtue of paragraph 3(1)(d) of the Federal Constitution (Modification of Laws) Order, 1957, is the Yang di-Pertuan Agong).

It was as I have said contended on behalf of the plaintiff that only by delegation by *Gazette* notification was it possible to have an effective delegation and that any other delegation was inadmissible. The plaintiff contended that section 91 of the Evidence Ordinance only applied to original documents and that the document in contemplation by the defendant was not complete because there had not been compliance with section 2 of the Delegation of Powers Ordinance, 1952. (It was not contested that delegations properly carried out under the provisions of the Delegation of Powers Ordinance, 1952, were saved by section 20 of the Delegation of Powers Ordinance, 1956, when that Ordinance repealed the 1952 Ordinance).

I am unable to agree with the submissions of the learned Senior Federal Counsel on behalf of the defendant. In the cases which he quoted the act of delegation had been completed and it was some procedural or administrative requirement which had in almost all cases not been complied with, and which had been held to be requirements which were directory and not imperative.

It seems to me that the provisions of section 10(f) of the Pensions Ordinance, 1951, give a power the exercise of which is discretionary and if that discretion is to be exercised by any person other than the person to whom it is given in the Statute then that power must be specifically delegated to someone else. In "*Judicial Review of Administrative Action*" referred to above it is stated at page 94:—

> "The principal effects of the exercise of a power upon the rights of individuals will often determine whether the relevant formal and procedural rules are to be classified as mandatory or directory. Thus, where powers are conferred on specified persons to issue certificates that affect civil liberty or rights to compensation, the Courts will insist that the powers be exercised only by the persons designated, who must genuinely apply their minds to the matter and must closely observe all material requirements as to form."

Nor do I think that the Principal Establishment Officer was acting merely as a clerk or amanuensis. The following passage from the same authority at page 181 is relevant on this point:—

> "Some matters, however, are so important that the Minister must address himself to them personally. It would appear that orders drastically affecting the liberty of the person, e.g. deportation orders, and detention orders made under wartime security regulations, fall into this category."

It was not stated whose alter ego the Principal Establishment Officer was supposed to be.

The whole question however is summed up with great clarity to my mind in *Maxwell on Interpretation of Statutes,* 11th Edition, at page 364 which reads as follows:—

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instructon involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

In addition the wording of section 2 of the Delegation of Powers Ordinance, 1952, itself cannot in my opinion bear the interpretation put on it by the defendant. This section reads as follows:—

"2. Where by any written law the High Commissioner is empowered to exercise any powers or perform any duties, he may, by notification in the *Gazette,* delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office:....."

It seems to me clear from the wording of this section "he may by notification in the *Gazette,* delegate subject to such conditions and restrictions as may be prescribed in such notification" that any delegation which the High Commissioner sees fit to make is made by notification in the *Gazette.* That is to say the act of delegation is only complete when the instrument of delegation is contained in a notification published in the *Gazette.* Any conditions and restrictions to which any delegation is subject are those which are prescribed in the notification and it seems to me to follow that the notification itself must be the operative act of delegation.

As it was admitted by the defendant that at no time had the powers contained in section 10(f) of the Pensions Ordinance, 1951, ever been delegated by notification in the *Gazette* to anyone it follows that the purported retirement of the plaintiff was void and of no effect.

There will be judgment for the plaintiff as follows:—

Prayer 1. A declaration that his purported retirement from the post of Assistant Controller of Foreign Exchange was void, inoperative and of no effect.

Prayer 2. An order that the defendant do pay to the plaintiff all arrears of pay, allowances and other emoluments from the date of the said purported retirement.

Prayers 3, 4 and 5. No order.

Prayer 6. Plaintiff's costs to be taxed and paid by the defendant.

Judgment for the plaintiff.

Solicitors:—*Jag-Jit Singh*; *Presgrave & Matthews.*

LEE YEN & ORS. v. KEPONG MINES LTD.

[O.C.J. (Azmi J.) October 29, 1963]

[J.B. — Muar Civil Suit No. 26 of 1963]

Workmen's Compensation Ordinance, 1952 ss.27, 28, 41(1)—Death of workman—Commissioner of Labour holding inquiry on his own volition—Commissioner adjudging compensation—Instalment payment to widow of deceased —Acceptance of one such instalment—Whether rejection of other instalments and subsequent claim for damages barred.

The plaintiffs the widow and infant children of the deceased claim damages for the negligence of the servant or agent of the defendant company as a result of which the deceased an employee of the defendant company met his death due to injuries sustained whilst in the course of the defendants employment. Soon after the death of the deceased the Commissioner for Labour instituted inquiries under section 27(2) of the Workmen's Compensation Ordinance and at a hearing in the presence of the widow adjudged that the defendant company pay to the plaintiffs $7,200 as compensation under the Ordinance. The money was placed on trust with the State Social Welfare Officer (to disburse it by monthly instalments) who paid the widow the first instalment of $110 on October 15, 1962. Subsequently the second and third instalments were rejected by her because she was not satisfied with the *quantum* and she had been advised not to accept compensation.

It was argued for the defendant company that the claim was barred under section 41(1) of the said Ordinance because it was as a result of the agreement of the three parties that the Commissioner finally made the adjudication by fixing the compensation at $7,200 though the Commissioner who held the inquiry admitted that